UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

LINCOLN CENTER FOR THE PERFORMING ARTS, INC.

and **Case No. 2-CA-32983**

LOCAL 100, HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION, AFL-CIO

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For the Respondent.
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SUPPLEMENTAL DECISION

Statement of the Case

STEVEN FISH, Administrative Law Judge. On April 1, 2002, I issued a Decision and recommend Order in the above entitled case, (JD(NY)-19-02), finding inter alia that Respondent violated Section 8(a)(1) of the Act.

Thereafter, on May 15, 2002 Respondent filed a Motion to reopen the record, in order to "adduce additional evidence demonstrating that the principal witness testifying on behalf of the General Counsel, whose testimony was relied upon by the Administrative Law Judge, appears to have committed perjury and concealed relevant and material evidence from Respondent."

On July 17, 2002, the Board granted Respondent's Motion to reopen the record, and remanded this matter to me in order to develop testimony on the issues raised in Respondent's motion and for the issuance of a supplemental decision.[1]

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[1] Member Liebman dissented from this decision, concluding that "the testimony and evidence in dispute, if adduced and credited, would not compel a different result as required by Section 102.48 (d)(1) of the Board Rules and Regulations. Rather, the effect of the evidence would be to merely discredit, contradict or impeach a witness, which is insufficient to warrant a reopening of the hearing."

The reopened hearing was held before me in New York, New York on December 5, 2002. At the close of the hearing, I granted Respondent's request to hold the record open for the receipt of an anticipated decision by Judge Loretta A. Preska on a motion for sanctions made against Local 100 by the Metropolitan Opera Association (the Met) in its civil action against Local 100 and its officers. On January 28, 2003 Judge Preska issue her decision 2003 U.S. Dist. LEXIS 1077 (S.D., N.Y. January 28, 2003) which is pursuant to my ruling made part of this record.

Briefs have been file and have been carefully considered. Based upon the entire record, including my observation of the demeanor the witnesses, I make the following:

FINDINGS OF FACT

I. Procedural Rulings

In a conference call prior to the resumption of the instant hearing, I made certain proceduial rulings regarding the scope of the hearing and what evidence I was prepared to hear.

The issues were also discussed on the record at the opening of the hearing, and Respondent submitted an offer of proof, detailing the evidence and testimony that it wished to submit. I affirmed my previous ruling and rejected Respondent's offer. Respondent, in its brief, reviews its request to submit said evidence before the supplemental decision is issued.

Respondent sought to call Sharon Grubin Esq. General Counsel for the Met as a witness concerning various issues, particularly "the position taken by the City of New York regarding the proprietary rights of Lincoln Center . . . . the background and reasons for the letter written by Lincoln Center and the Metropolitan Opera Association to the Mayor of New York City in April of 2000 concerning Lincoln Center's policy of enforcing its property rights on the Columbus Avenue sidewalk; and . . . . the reasons the non-Union leafleters who were present on that sidewalk on May 11, 2000 were not asked to leave."

This proposed testimony relates primarily to my findings that I made in my decision, concerning the position of the City of New York with respect to Respondent's right to exclude leafleters from the Columbus Avenue sidewalk and the motivation for Respondent's decision to institute a new policy and or decide to enforce an old policy, which I found to be at least in part motivated by the Union's protected conduct. However, in my view, as I expressed previously, these matters are not related to or dependent upon the testimony of Diaz, and were therefore not evidence that the Board contemplated being heard in the instant remand.

The Board's order remanded to develop testimony "on the issues raised in Respondent's Motion". Said motion made no reference to the testimony of Grubin, or any of the issues raised by her testimony, that Respondent now seeks to offer. To be sure, Respondent in its reply to the position statement of General Counsel and Charging Party, did submit an affidavit from Grubin, which in the last paragraph did make reference to these matters. However, it appears that in that regard, Respondent was merely seeking to argue that once Diaz's testimony is discredited, as it believes is appropriate, the entire case should be dismissed. Respondent, obviously recognizing the deficiency in this argument, since the findings with respect to the City's position, and the letter to the Mayor, were not impacted at all by Diaz's testimony, attempted to show that the findings I made were wrong, based on "inadmissible hearsay", or otherwise unsupportable. This is clearly an attempt to give Respondent a second chance to present evidence, that it could have and should have presented at the initial hearing.

This evidence is not newly discovered or previously unavailable, unlike the evidence concerning Diaz's alleged perjury, which the Board's order clearly contemplates being heard.

I note in this regard, that when I received into evidence the letter from Dan Connolly, the City's attorney to Grubin, Respondent vociferously objected. I received it anyway, pointing out to Respondent on the record, that I viewed the statement made therein by Connolly represented at least some evidence of the city's position concerning Respondent's right to exclude leafleters from the Columbus Avenue sidewalk, but that Respondent was free to call Connolly or any other witness to refute or explain this statement in the letter. Indeed Respondent's attorney in objecting to the letters introduction, stated that it might be necessary to call someone from the New York City Police Department or the Corporation Counsel's office. However, although there was a postponement of the hearing from July 12, 2001 to July 25, 2001, Respondent failed to call Grubin, Connolly or any other witness to refute or explain Connolly's statement in his letter. That was the time when Respondent should have called Grubin as a witness, and it cannot do so now in the remanded hearing, which was remanded for the sole and limited purpose of assessing Diaz's credibility, in view of the new evidence found in his deposition testimony.

Similarly, I made findings with respect to Respondent's conduct concerning the letter to the Mayor. These findings were again not dependent on Diaz's testimony, and Grubin's purported testimony which could refute my findings with respect to the letter, is not newly discovered or previously unavailable, and also could and should have been adduced at the initial hearing.

Also, Respondent sought to call Grubin to ask her about the events of May 11, 2002, and particularly about her conversations with Lt. Albano of the New York City Police Department about removing leafleters. However, this evidence is once again not newly discovered, nor previously unavailable. Nor is it directly related to Diaz's credibility.

Respondent also sought to introduce evidence from Grubin as well as Evelyn Finkelstein, General Counsel for Respondent, and Charles Sims, attorney for Respondent in the related civil case before Judge Baer. In my decision, in response to Respondent's argument that Judge Baer's order provided it with a sufficient property interest to exclude the leafleters, I rejected this contention for a number of reasons, including the fact that Respondent had not made an attempt to go back to Judge Baer, and seek a contempt finding against the Union.

Respondent seeks to adduce evidence that it did in fact try to seek relief from Judge Baer, but was not successful, because the Judge believed that he was without jurisdiction, since the action was dismissed. However, as with the other evidence proffered by Respondent, this evidence has no relationship to Diaz's testimony, is not newly discovered or previously unavailable, should or could have been introduced at the initial hearing, and was not contemplated to be part of the remanded hearing by the Board.

Finally, Respondent sought to introduce evidence of the Union's alleged "discovery abuses" in the Met Opera action, wherein Diaz's alleged "perjury" was discovered. According to Respondent, such evidence would show that the Union was refusing to produce in that action, the very same documents, i.e. Weekly reports of the Union's employees including Diaz, that Diaz lied about in the instant hearing. Therefore Respondent contends that Diaz's alleged perjury in the NLRB hearing is part of a pattern of deceit engaged in by the Union in the Met Opera action.

After listening to extensive argument on the subject during the conference call and on the record at the reopened hearing, which included assertions made by counsel for Met Opera, I concluded that I would not permit testimony concerning the "discovery abuses" of the Union. I stated then, and I reaffirm that ruling now, that whatever relevance there might be to this evidence to the issues before, is outweighed by the time it would take to litigate difficult discovery issues.

Moreover, I did agree to Respondent's request to hold the record opened to receive Judge Preska's ruling on Met Opera's request for sanctions, which would presumably detail these discovery abuses. In fact, Judge Preska did issue a 66 page decision, which set forth in significant detail, the conduct of the Union and its representatives during discovery. I have carefully reviewed that decision, and it will be discussed more fully below. However, particularly since that decision is part of the record herein, I reaffirm my ruling to bar Respondent from adducing testimony concerning the "discovery abuses" of the Union.

I also reaffirm my other rulings detailed above, concerning Respondent's requests to adduce additional evidence, and shall now proceed to consider the matters that I believe are contemplated by the Board's remand order.

II. FACTS

Respondent's motion is based on the assertion that Diaz committed perjury during his testimony on July 11, 2001, in two separate exchanges, during his cross examination by Respondent's counsel.

Diaz testified concerning the events of May 11, 2000, and more particularly that he overheard Evelyn Finkelstein on a cell phone demanding that he be arrested.

Diaz was extensively questioned by Respondent's counsel with respect to his testimony about that incident. In the midst of cross-examination about that testimony, which took three pages in the transcript, the following questions were asked by Respondent's attorney, and the following responses by Diaz were given, which Respondent contends constituted perjury by Diaz.

> Q. [By Mr. Conrad] Did you make any notes about what you heard said at that time? At that time did you make any notes of what you had overheard?
>
> A. Well right after I heard that -
>
> Q. Please answer the question.
>
> A. I didn't make no notes
>
> Q. You didn't make any notes?
>
> A. No.
>
> Q. Did you make any notes of what had happened there while you were leafleting at the bottom of those steps in front of Avery Fisher Hall at any time.

A. I could have written some notes

Q. I'm not asking you to guess. Did you or didn't you

A. I can't remember

Q. Do you keep a diary?

A. No.

Q. Do you keep a calendar of your appointments

A. A calendar of what's going on, yes. But I don't save them

Q. Do you log what you do on a day-to-day basis? Your activities on behalf of Local 100?

A. No.

After this exchange, Respondent resumed questioning of Diaz regarding "the individual you overheard on the phone", for an additional four pages of testimony.

Diaz also furnished testimony that on July 1, 2000 he went to Respondent's premises on his day off, observed groups other than the Union distributing leaflets on the Columbus Avenue sidewalk, and that these groups were not asked to leave by Respondent's officials. Diaz also testified that he collected leaflets from these individuals on that day, and dated them July 1, 2000.

During Diaz's cross-examination about the events of July 1, 2000, the following exchange took place, which Respondent also asserts reveals perjurious testimony by Diaz

Q. Did you make any notes about the events of July 1st?

A. July 1st? The leaflets. I wrote the notes on the leaflets. 6:30 -

Q. -- The times?

A. The times.

Q. Is that the full extent of the notes that you took?

A. Yes

JUDGE FISH: You have to say yes.

Q, Now you (sic) affidavit was given on June 30th, so there is no mention, of course, in here about the events of July 1st or July 6th. But did you make no record of those events – well, I guess you did. You said you made the notes on the leaflets. Okay.

JUDGE FISH; You have to answer.

A. Yes,

Q. But you don't have anything at all from July 6th, do you? On or about July 6th.

A. No.

Q. These leaflets that are in evidence now as General Counsel's Exhibit Number 7, do you remember giving them to the NLRB?

A. Yes.

Q. And when? Did you give them to the NLRB at around the time that you obtained them?

A. No.

Q. When did you give them to the NLRB?

A. Recently.

Q. And where have they been maintained since you obtained them?

A. I had them in a folder.

Q. Were you involved in gathering any documents pursuant to a subpoena that I served on Local 100?

A. No.

Q. No? You received a subpoena, correct?

A. Correct.

Q. And then you turned it over to a lawyer for Local 100?

A. Correct.

Q. Did you have anything to do with it after that?

A. No.

Q. No one asked you for any documents that you had?

A. What was being requested, there is a person that's in charge of keeping the leaflets and stuff like that.

Q. Keeper of records. Weren't you saying before that you kept a file of your own?

A. No. I kept a file for this day only. I kept that file.

Q. A file just for the one day?

A. That day?

Q. Why just for the one day?

A. That's what I did?

Q. And no other file at all?

A. No. That's it.

Q. Everything else during this whole period of time you turned over to someone else?

A. Someone is in charge of keeping all the records; that if there are any leaflets that person puts it on file has a file with all the leaflets.

Q. Who is that file?

A. Mr. Gooderman.

Q. What is Mr. Gooderman's job at the Local?

A. Researcher.

Respondent's contention that Diaz lied during his testimony on July 11, 2001, is based on the fact that during the Met Opera litigation, it was disclosed that Diaz filled out "staff weekly reports", and "datebooks", and that Diaz kept more than one file, contrary to his trial testimony.

The "datebook", which Respondent argues is a "calendar", was turned over to Met Opera in August of 2001, pursuant to prior document requests, and were used by Met Opera's counsel in examining Diaz in his deposition on November 15, 2001. During this deposition, Diaz disclosed that he also filled weekly reports which "shows what we do on a daily basis". At that time Met Opera's counsel demanded that weekly reports for Diaz as well as other Union officials be turned over to it, asserting that these documents would have been called for by a number of prior document requests.

On January 10, 2002, the Union answered Met Opera's interrogatories concerning compliance with discovery obligations. Diaz's responses reflected that he had a entire drawer full of Met Opera Restaurant and Lincoln Center documents, and that he has a file folder for each shop in the two drawers of his file cabinet.

Additionally, Diaz indicated that he "also maintained my date book", and in answer to another question, stated that "sometime after May 25, 2001, I was instructed to keep my date book and to hand over earlier date books for copying." Finally, Diaz also in response to another inquiry, stated "Ms. Yen asked me to update my date book just before my deposition."

Diaz furnished testimony during the remanded hearing on December 5, 2002, concerning the various documents described above, and why he did not disclose to Respondent the existence of these documents, in answer to Respondent's inquiries on July 11, 2001.

Diaz is a salaried employee, who does not have set hours, but generally works about 55 hours per week, including frequently on weekends. He does not receive overtime or compensatory time for weekend work.

Diaz maintained during his employment with the Union a document which he refers to as a "datebook", which is a small booklet, entitled "week at a glance appointments . . .. for planning, appointments and memoranda on a weekly basis." The book consists of a page for each week, with spaces for each day to put in appointments or other material. The notations that Diaz places in this datebook are according to Diaz short notations of his scheduled appointments. A review of these "datebooks" tends to corroborate Diaz's testimony on this subject. The entry for May 11, 2000 states, "Met Opera action." For June 28, 2000, the entry is "tentative swing action."

According to Diaz, he testified in July 2001, that he did not keep a "diary", or a "calendar of his appointments", and that he did not "log what you do on a daily basis", primarily because he believed that these questions related to documents which reflect the conversation that he heard between Evelyn Finkelstein and someone else on May 11, 2000. Further, Diaz testified that he did not consider his "datebook" to be a calendar of appointments, since the calendar he referred to in his testimony was a calendar of union related matters that is posted at the Union Hall. He also asserted that he did not consider his datebook to be a "diary", or a "log", since in his view a diary or a log are detailed statements of events after they occurred, which information is not contained in his "datebooks".

Diaz also prepares as noted, "weekly staff reports", which are required to be filled out by him for pay purposes, and is then given to the Union's secretary. According to Diaz, these reports list his daily activities, and he prepares them by consulting his date book, and transferring the entries from the datebook to the weekly reports.

Once again, Diaz testified that he did not mention these weekly reports to Respondent's counsel in July 2001, because he believed that he was being asked about his testimony concerning Evelyn Finkelstein, and the weekly reports contain no information about that testimony. Furthermore Diaz also testified that he did not consider the weekly reports to be a "log" of his activities, since it was not a detailed description of events, which is what Diaz considers to be a "log".

A review of the weekly reports prepared by Diaz does reflect that they are similar to his datebooks and that they generally contain brief description of his activities such as "team meeting", "organizing meeting" names of shops visited, or states "office". For May 11, 2001, his weekly report states "Met Opera Rally", which is identical to his datebook entry for that date. For Wednesday, June 28, 2000, his weekly report stated, "Staff Meeting Office." In contrast his datebook reads "Leads Meeting", and "tentative swing action 7 – 9 p. m."

Furthermore, while Diaz testified that he generally prepares his weekly reports by transferring entries from his datebook to his weekly reports, an examination of these documents, reveals that at least in some instances there are entries in Diaz's weekly reports, for

which there is no corresponding entry in his datebook over a three year period from 1999-2001.[2]

Diaz was asked about one instance, where his datebook contained an entry for Angelo and Maxis on Saturday March 27, 1999, but his weekly report did not contain any entries for that day. Diaz could not recall what happened in 1999 with respect to these entries, but speculated that since he also had entries for Wednesday, March 24, 1999 for that restaurant on both his datebooks and weekly reports, that he might not have gone as scheduled to that restaurant on March 27, 1999.

Moreover, for Saturday, July 1, 2000, neither Diaz's datebook nor his weekly report contained any notation that Diaz was at Lincoln Center on that date. In fact both documents contain no notations at all for that date. As noted, I found in my prior decision that Diaz had gone to Lincoln Center on July 1, 2000 on his day off, and that he observed various groups leafleting on the Columbus Avenue sidewalks, while no attempt was made by representatives of Respondent to evict them.

Diaz attempted to explain the omission of an entry for that date in his datebook or weekly report, by asserting that Saturday was his day off, and he made the trip on his own time, so he did not include it on his weekly report. Further since he had not made an appointment to go there, he did not record the visit in his datebook. He added that the visit did not appear on his weekly report, because it wasn't in his datebook, and the entries in his weekly report were transferred from his datebook.

Diaz also furnished testimony at the reopened hearing, concerning his July testimony about files. Diaz maintains a Met Opera draw, which consists of organizing information about the Union's organizing efforts among Restaurant Associates employees, employed at Met Opera. This file includes organizing sheets, names and addresses of workers and anti-union literature distributed by the Company.

Diaz testified that he did not mention these files when he testified on July 11 that he kept only one file, because he was asked by Respondent about the July 1, 2000 incident, and the folder of leaflets that he collected on that day.,

Respondent observes that its questions were not so limited, and referred specifically to the documents subpoenaed by Respondent from the Union in the initial hearing. The subpoena called for the production of the following documents from the Union.

RIDER TO SUBPOENA DUCES TECUM NO. 349341

1. Copies of all memoranda, letters, notes, affidavits, statements, photographs, videotapes, audiotapes, journal/log entries or other writings or recordings of any kind that discuss, record, document, refer to or relate to any alleged threats made on May 11 and June 28, 2000 by agents of Lincoln Center for the Performing Arts, Inc. ("Lincoln Center") and/or the New York City Police Department, to arrest H.E.R.E., Local 100 ("Local 100") representatives because they attempted to hand out leaflets on the lower sidewalk on the west side of Columbus

[2] The record reveals some 46 instances, where entries in the datebook do not appear in Diaz's weekly report.

Avenue, in front of and below the main Lincoln Center Plaza (hereinafter referred to as the "Lower Sidewalk.")

2. Copies of all leaflets, handbills, flyers, brochures, petitions or other written materials that Local 100 representatives allegedly attempted to hand out on the lower Sidewalk on May 11 and June 28, 2000.

3. Copies of all applications, in any form, made by Local 100 to Lincoln Center or to the City of New York and/or Department of Parks and Recreation, for permission to conduct leafleting, picketing, a demonstration, a vigil, or any other similar form of concerted activity on the Lower Sidewalk on May 11 or June 28, 2000.

4. Copies of all memoranda, letters, notes, affidavits, statements, photographs, videotapes, audiotapes, journal/log entries, or other writings or recordings of any kind that discuss, describe, record, document, refer to or relate to any leafleting or picketing, and demonstration or vigil, or any other similar form of concerted activity by any persons, associations, groups or organizations, including but not limited to labor organizations, at any time prior to or after April 25, 2000, if such activities are to be relied on as the basis for any claim by Local 100 in unfair labor practice case No. 2-CA-32983 that Lincoln Center has discriminated in the enforcement of its alleged rights in the Lower Sidewalk.

As related above, I have received into evidence, Judge Preska's opinion, dated January 28, 2003, in which she granted motions made by Met Opera for sanctions against the Union and its counsel, and rendered judgment as to liability against defendants and attorneys fees because of discovery abuse by defendants and their counsel.

Judge Preska's decision, which was made without the benefit of a hearing, was primarily focused on discovery abuses by Respondent's counsel, with emphasis on its failure to properly supervise the compilation of documents requested, and the failure to devise an adequate system for the compilation and retention of documents requested by Met Opera.

Judge Preska also made several findings concerning the weekly reports, filled out by union officials, including Diaz, which as noted above is one of the documents that Respondent claims that Diaz lied about in his July 2001 testimony.

Judge Preska found that William Granfield, the current president of the Union, lied in his deposition about whether Union members working on a campaign against the Met filled out reports of their activities, referring to the same staff weekly reports in issue herein. The Judge also made several findings, which Respondent alleges are pertinent the issues before me. They include:

- That "[s]everal of plaintiff's document requests called for the production of the [weekly] reports kept by Diaz and other Local 100 representatives, but they were "never produced or otherwise made known in document production or deposition testimony." Id. at 51

- That "[i]n attempting to explain his apparently prejurious testimony denying that he had provided written reports to the International with respect to his activities," Granfield stated he "does not consider his weekly time records to be 'written reports to the International with respect to [his] activities;'" rather, "the reports instead account for his time using general phrases or words to explain where he has been during each day of a pay period." Id. at 56.

- That "when [Union counsel Marianne] Yen finally agreed to produce the Weekly Reports, she decided (she did not inform Met counsel) that she would produce them only for those people for whom the Met had requested day planners and calendars." Id. at 111.

- That "[I]t was only after the court ordered [Yen} to do so that she obtained . . . [weekly] reports [submitted to the International's office]." Id., at 142.

- That "[t]he Met [did not] receive [ ] Tamarind's and Grandfield's Weekly Reports [until] December 28, [2002,] three days before the close of discovery," and that "[t]here was significant gaps even in that production." Id. at 113, M.23

- That "as set out in excruciating detail [in the Met's declarations and other supporting papers] scores of clearly responsive documents (some of which, like Weekly Reports, were expressly ordered to be produced) have never been produced." Id. at 151.

- That "[t]he Weekly Reports were called for in the Met's first document request . . . and were of obvious relevance in documenting activities that are the subject of this action," that "Granfield falsely denied their existence," and that "all such reports have to date not been produced." Id. at 159.

- That "the Union's failure to produce Weekly Reports proceeded initially from Granfield's false testimony that he prepared no log of his activities on behalf of the Union" Id. at 162.

- And, that "many documents have been destroyed that related directly to events taking place during the most critical time period in this action, . . . when the Union planned its campaign against the Met." Id. at 171-72.

None of Judge Preska's findings in sanctioning the Union and its counsel appeared to be based on any conduct of Diaz. However, Judge Preska did make reference to Diaz's testimony in the instant NLRB proceeding, where Diaz had denied that he "logged what (he did) on a day

to day basis . . . . (his) activities on behalf of Local 100."[3] Judge Preska quoted this testimony in a footnote, after relating what she described as "falsehoods uttered by individual defendants and by Union counsel," and characterized Diaz's NLRB testimony as "similarly" to the conduct of these other Union representatives.

However, Judge Preska quoted from Diaz's deposition taken on November 15, 2001, wherein Diaz disclosed to Met Opera's counsel that he and other Union representatives filled out weekly reports of their activities. At that time, Met Opera's counsel stated that these documents should have been provided to Met Opera, pursuant to prior document requests and requested their immediate production.

There is no reference to Diaz's datebook in Judge Preska's decision, but the record discloses that the Union did provide copies of Diaz's datebook to Met Opera's counsel, in August of 2001, pursuant to a document request. Further, in response to Met Opera's written interrogatory, dated January 10, 2002, Diaz responded that "sometime after May 25, 2001, I was instructed to keep my datebook and to hand over earlier datebooks for copying. "In response to another question, Diaz responded, "Ms. Yen asked me to update by datebook just before my deposition."

IV. ANALYSIS

Respondent contends that the evidence demonstrates beyond question that Diaz lied and committed perjury during his testimony on July 11, 2002, by denying to Respondent the existence of his datebook, which Respondent asserts is clearly a calendar, and of his staff weekly reports, which Respondent asserts is a diary or a log of his activities, and of his Met Opera draw, which demonstrates according to Respondent that Diaz had more than one file, contrary to his prior testimony.

Respondent argues further, that once it is concluded that Diaz did in fact commit perjury as it asserts, that the entire complaint should be dismissed on policy grounds, and or because once Diaz's testimony is stricken as it should, then there is no longer any evidence in the record to support the finding of a violation.

I disagree with all of Respondent's assertions. I conclude, that Respondent has not established that Diaz committed perjury during his testimony on July 11, 2001, and that nothing disclosed at the reopened hearing warrants either the striking of Diaz's testimony, or any changes in the credibility resolutions that I made in my prior decision.

Furthermore, I conclude that even if I were to find that Diaz had committed perjury or lied during his prior testimony, none of the conclusions set forth in my prior decision would be affected, since the record contains ample evidence, including admissions by Respondent's witnesses to support the violations that I have found.

The only possible effect a finding of perjury by Diaz might have, could be concerning my factual findings as to the events of July 1, 2001. However, even I were to discredit Diaz's testimony about that day, my findings of disparate treatment and discriminatory enforcement of Respondent's policy of excluding leafleting on the Columbus Avenue Sidewalk would not change.

[3] Judge Preska had been provided with Diaz's testimony by Met Opera's counsel.

With respect to the allegation made by Respondent that Diaz committed perjury on July 11, 2001, I note that title 18 U.S.C. section 621 defines perjury as testimony given "willfully and contrary to such oath", and on "any material matter which he does not believe to be true."

In my judgment, Respondent has not shown that Diaz had violated the statute in his July testimony. Thus it is not enough to establish that Diaz's testimony was inaccurate or even false. It must be proven that Diaz provided testimony that "he does not believe to be true", and that it was "willfully" contrary to his oath. In order to assess these questions it is essential to examine the context of the allegedly false responses. *Local 11 Electrical Workers* (*AMCO Electrical*), 273 NLRB 183, 195 (1984); *Hunkin-Conley Construction Co*., 100 NLRB 955, 950 (1952).

Here, although Diaz denied that he had a calendar, diary or log of his activities, all of these questions were asked in the context of extensive questioning of Diaz about the events of May 11, 2001, and his testimony concerning his overhearing Finkelstein's conversation. Thus all of the questions before and after the alleged perjurious testimony, dealt with that subject. Therefore, I find it plausible, and credible as testified to by Diaz at the reopened hearing, that Diaz believed that the questions about calendars, logs and diaries related to the issue of the overheard conversation between Finkelstein and someone else. Since none of the documents that Diaz failed to mention i.e. his datebook and his weekly reports, made any mention of this conversation, I conclude that it cannot be found that he "did not believe his testimony to be true", or that he "willfully" violated his oath to testify truthfully.

I have considered the fact, as Respondent argues, that Diaz's affidavit, prepared by the Union's attorney, in response to the Motion to Reopen, contains no reference to Diaz's belief that the questions related to his testimony about the Finkelstein conversation. However, I agree with General Counsel that no inconsistency has been established, but at most demonstrates that the affidavit was incomplete. Indeed, the Union attorney may not asked Diaz about the issue of the context of the questioning or did not realize the significance of same and did not include it in the affidavit. Moreover, the contest of the questions is something that can, and should be examined, whether or not it appeared in Diaz's affidavit.

Similarly, the testimony give by Diaz concerning his files must also be examined in context. In that regard, once more I credit the testimony of Diaz that he believed that he was being asked about files concerning his testimony about July 1, 2000, since that was the subject of his cross-examination at the time. Therefore, since he kept only one file concerning July 1, 2000, and the leaflets that he collected on that day, he did not believe that he was being asked about his organizing files in general, or those files in the "Met Opera draw." To the extent that Respondent argues that its question related generally to documents that Respondent subpoenaed for the initial trial, its subpoena specifically referred only to documents General Counsel intended to rely on to prove that Respondent discriminated in the enforcement of the Union's rights on the Columbus Avenue Sidewalk. Thus, Diaz's "Met Opera" files would not be covered by that subpoena.

Additionally, I also find credible Diaz's testimony that even apart from the context of the questions he not believe that he was being asked about his datebook or his weekly reports. He testified that he did not view his datebook as a calendar and that when asked about a calendar he responded truthfully that the only calendar of "what was going on", was the calendar posted in the Union hall. I find this testimony plausible, and indeed supported by Diaz's responses to interrogatories of Met Opera, where he twice referred to his datebook as a datebook, and not as a calendar.

With respect to the weekly reports, Diaz again credibly testified that in his view, a diary or a log of activities, involves a detailed account of events, rather than the cursory entries that appear on the weekly reports or indeed his datebook.

Therefore, while it is certainly reasonable to characterize these documents as calendars, logs or diaries as Respondent contends, it is also plausible to construe them as Diaz testified. I conclude that such issues of semantics do not warrant a finding of perjury.

Respondent's reliance on Judge Preska's decision to support its contention that Diaz committed perjury is misplaced. Judge Preska's decision to, find sanctions against the Union and its attorneys, was not based on any conduct of Diaz. The only negative reference to Diaz, came in footnote, where Judge Preska simply noted, based apparently on Met Opera's submission of selected excerpts of the transcript, that Diaz had denied that he logged what he did on a daily basis, and analygized it to conduct of other Union officials. However, Judge Preska did not conduct a hearing prior to rendering her decision, and did not have the benefit of Diaz's explanatory testimony, which I have credited. Therefore, I cannot give any weight whatsoever, to her footnote concerning Diaz's testimony at the NLRB, even if it can be construed as an attack on Diaz's credibility.

Judge Preska did make numerous findings adverse to the Union and its officials, including findings that Granfield, the Union's president falsely testified about the existence of staff weekly reports, and that the Union failed to produce these reports to Met Opera in a timely fashion. However, I do not agree with Respondent that these findings have any bearing on Diaz's credibility in this proceeding. Respondent argues in effect that Diaz's failure to disclose the existence of his datebook, weekly reports and Met Opera draw, was part and parcel of the Union's conduct in avoiding its discovery obligations in the Met Opera action. Such a contention is belied by the record.

Diaz's datebooks were disclosed to and furnished to Met Opera pursuant to a document request in August of 2001. More importantly, the weekly reports, that other Union officials had apparently lied about, were disclosed by Diaz in his deposition in November of 2001. Therefore, if Diaz was part of a Union wide conspiracy to prevent these weekly reports from being disclosed, then he would not have mentioned their existence in his deposition.

Indeed, whatever the importance of these weekly reports may have been to the Met Opera Action, I conclude that neither it nor the datebook had any significant relevance to the issues before me. These documents contain only brief descriptions of Diaz's appointments or activities, and contain no significant material, that would warrant the conclusion that Diaz, would lie about these matters. In my view these documents were not "material" under the U.S. Code's definition of perjury.

I recognize in this regard, as Respondent argues that neither the datebook, nor his weekly report, listed that Diaz was at Lincoln Center on July 1, 2000, and that Diaz had furnished extensive testimony to that affect in his earlier testimony. However, I find it highly improbable, that Diaz would have the sophistication to decide to lie about these two documents, in order to "cover up" his further alleged lie about the events of July 1, 2000. Indeed the record discloses that Diaz turned over to his attorney, based on Met Opera's document request, his datebooks shortly after May of 2001, before his testimony before me. Moreover, the datebook was turned over to Met Opera, in early August, less than a month after his initial testimony in this proceeding. Therefore, Diaz knew that his datebook would be disclosed to Met Opera, and presumably that it made no mention of his July 1 appearance at Lincoln Center.

Thus, Respondent's argument that Diaz simply made up his testimony that he went to Lincoln Center on July 1, 2000, and that he lied about the existence of these documents, which would contradict this testimony, is not convincing. Again, his testimony about these documents was given in the context of extensive cross-examination about the events of May 11, 200l, and I find it highly unlikely that Diaz was even thinking about his prior testimony concerning July 1, 2000, when he gave his responses to Respondent's questions.

Accordingly, I conclude based on the foregoing, that Respondent had not shown that Diaz committed perjury in his testimony of July 11, 2001, and that his testimony should not be stricken as Respondent contends.

That still leaves another issue for resolution, that even apart from whether Diaz committed perjury, whether my findings with respect to July 1, 2000 should stand, in view of the fact that neither his datebook nor his weekly reports reflect his appearance at Lincoln Center on that date. This is a close question, but on balance, I conclude that no changes should be made in my prior findings.

Diaz did attempt to explain the failure of either of these documents to include a reference to Lincoln Center on July 1, 2000. He asserts that since he had no appointment to go to Lincoln Center, it was not included in his datebook. Moreover, he claims that he did not include the visit in his weekly report, because he generally prepares his weekly reports from his datebooks. However, this explanation is not convincing, since the record reflects substantial discrepancies between the datebook and the weekly reports. While these facts tend to weaken his testimony on this issue, it does not necessarily lead to the conclusion, as Respondent asserts, that Diaz made up the entire incident.

The fact is that the record does contain some corroborating evidence, particularly the leaflets that were placed in evidence, with the date July 1, 2000 written thereon. Moreover, and more importantly, Respondent adduced no contrary evidence to refute Diaz's testimony at either the original hearing or the reopened hearing. It did not call Fletcher, its agent to offer contradictory testimony to Diaz. I drew an adverse inference from the failure of Respondent to do so at the original hearing, and I do so again, with respect to its failure to produce Fletcher at the reopened hearing. Respondent knew full well that the events of July 1, 2000 were in issue at the reopened hearing. Indeed the motion and the response make clear that the documents in question related only to Diaz's testimony about his appearance at Lincoln Center on July 1, 2000. Yet Respondent, although as noted made offers of proof, in an attempt to expand the scope of the reopened hearing, which I rejected, made no attempt to call Fletcher as witness. Nor did it provide any explanation or excuse for its failure to call him. In these circumstances, I conclude that an adverse inference is appropriate, and I find that if called as a witness, Fletcher would have corroborated Diaz's testimony.[4]

Therefore, based on the above, I find no basis to change any of my prior findings concerning Diaz's testimony as to July 1, 2000, or otherwise.

Furthermore, even if I were to agree with Respondent's assertion that Diaz committed perjury during his testimony, this finding would not result in any changes in any of the conclusions made in my prior decision. In that regard, the primary issue litigated by the parties was the question of whether Respondent had a sufficient property interest in the Columbus

[4] I also note that Respondent failed to call Police Officer Kennedy who could also have refuted Diaz's testimony, but did not do so at either hearing.

Avenue sidewalk, to exclude leafleters. The issues relating to this question are not dependent on Diaz's testimony.

Respondent argues in this respect, that absent Diaz's testimony, which it believes should be stricken, there is no basis in the record for the finding of a violation. I disagree.

I credited Diaz's testimony, (which was not denied by Finkelstein), that he heard tell on the phone someone to arrest the leafleters, and found that in fact Finkelstein was speaking to the police. Even apart from the adverse inference that I drew from Finkelstein's failure to testify, the record contains important corroborating evidence of this finding, namely the letter from Grubin, which establishes that on May 11, both Grubin and Finkelstein summoned the police to arrest and remove the leafleters from the Columbus Avenue sidewalk.

Moreover, Talamo testified that on May 11, he approached Diaz, ordered him to leave the sidewalk, and threatened to consult the police if he didn't leave. Talamo then requested the police to remove Diaz, but the officer declined to take any action. This conduct of Talamo, as I observed in my decision is violative of the Act, and is not dependent on Diaz's testimony.[5]

As for June 28, 2000, I did credit Diaz's testimony that on that date, Talamo approached him while he and other union officials were leafleting, and told them that they could not leaflet, because they would be in violation of a court order. Talamo added that they would be arrested if they did not leave. I further found, as Diaz testified that Talamo then spoke to a police officer, who in turn approached Diaz and told him to leave and threatened arrest for violation of a court order. Finally, I found that the police officer after discussion with Diaz, handed Diaz Talamo's card, and stated Talamo would be the complainant. Talamo did dispute this testimony of Diaz, and further testified that he did not recall any conversation with Diaz on June 28, 2000. However, even if I were to credit Talamo and discredit or strike Diaz's version of events on June 28, 2000, my ultimate conclusions would not be affected. Thus Talamo testified that on at least a half a dozen occasions, at or around June 28, 2000, he would tell Diaz that Respondent objects to Diaz leafleting on the Columbia Avenue sidewalk, and would like him to move. Diaz would refuse to move, and Talamo replied that he would consult the police about the matter. Further, Talamo then requested the police to take action to remove Diaz, and the police officer stated that he was not prepared to take any action. Thus these admissions by Talamo are more than sufficient to establish that Respondent attempted to exclude leafleters from the Columbus Avenue sidewalk, threatened to and in fact did try to have the police arrest or remove the leafleters. These actions by Respondent, which are made independent of any testimony from Diaz, are violative of the Act, unless Respondent had a sufficient property interest in the Columbus Avenue sidewalk to exclude peaceful leafleting, which I have found Respondent did not possess.

With respect to that ultimate issue, my findings concerning Respondent's property interest in the sidewalk was also not dependent at all on any of Diaz's testimony, and therefore would not change, even if Diaz's testimony was entirely discredited.

[5] The fact that Talamo, as Respondent asserts, made reference to the agreement reached between the parties, when ordering Diaz to leave is not significant. As I detailed in my prior decision, for number of reasons, I concluded that the "settlement" agreement incorporated in Judge Baer's order did not provide Respondent with a sufficient property interest to exclude the leafleters from the Columbus Avenue sidewalk.

The only factual finding that I made that could be affected by the discrediting of Diaz's testimony, was my findings as to the events of July 1, 2000. It is thus conceivable, that had I found that Diaz perjured himself on July 11, 2001, that I would strike his testimony as to the events of July 1, 2000. However, such a finding would not in my judgment change my overall conclusions that Respondent disparately enforced its ban on leafleting on the Columbus Avenue sidewalk. I conclude that even absent consideration of the events of July 1, 2000, the evidence is sufficient to make this finding.

Thus, I have found that Respondent instituted a new policy, or alternatively enforced a policy previously ignored, to prohibit leafleting on the Columbus Avenue sidewalk, because Local 100 had increased its leafleting, and became "pushy" or more "aggressive". Since being "pushy" or "aggressive", does not without more, transform protected conduct of leafleting into unprotected activity, Respondent's decision to change its policy is unlawful. This conclusion is also relevant to the disparate treatment finding that I made in my prior decision, which is also supported by the events of May 11, 2000, where Respondent made no effect to evict other groups of leafleting, while attempting to remove only representatives of the Union. Further, I also relied on the comments made by Talamo to Travis on June 28, 2000, which I found evidenced discriminatory treatment of the Union, and these findings are also independent of any testimony from Diaz.

Accordingly, based on the foregoing, I would find, even without relying on any testimony of Diaz, that Respondent violated Section 8(a)(1) of the Act, as set forth in my prior decision.

Lastly, I now turn to an evaluation of the Court of Appeals decision in *Hotel Employees Local 100 v. City of New York et al*, 311 F.3d 534 (2d Cir. 2002). That decision, which was issued on November 18, 2002, upheld the prior ruling of Judge Duffy that Lincoln Center had the right to prohibit rallies, demonstrations, and leafleting on the Plaza. The Court concluded that the Plaza is not a "traditional public forum", and therefore that Respondent's policy is "constitutionally permissible because it is both viewpoint neutral and reasonable." 311 F.3d at 539.

However, throughout its opinion, the Court made repeated references to decisions some of which I cited in my decision, finding that sidewalks are traditional public fora. 311 F.3d at 544-45, 547, 549-550. *U.S. v. Grace*; 461 U.S. 171 179-180; *Venetian Casino Resort v. Local Joint Executive Board*, 257 F.3d 937, 945 (9th Cir. 2001)[6]; *Hague v. C10*, 307 U.S. 96, 1515-1516 (1939); *Frisby v. Schultz*, 407 U.S. 474, 479 (1988); *Perry et a*l, 460 U.S. 37, 45.

The Court, after rejecting the Union's contention that the Plaza was a public forum, then decided the case on the basis that it was either non-public or limited public forum. In such circumstances, it examined closely the reasonableness of the restrictions imposed by Respondent. In that connection, it was particularly concerned with the prohibition of leafleting in the Plaza, recognizing the heightened constitutional scrutiny placed on restrictions of leafleting. *Krishna Society v. Lee*, 505 U.S. 672 (1992); *Paulsen v. County of Nassan*; 925 F.2d 65, 66 (2nd Cir 1991); *Wolin v Part of NY*, *Authority*, 392 F.2d 83, 89 (2nd Cir. 1968), *Chicago Acorn v. Metro Pier & Exposition*, 150 F.3d 695, 703 (7th Cir. 1998).

[6] In this case the 9th Circuit held that a privately owned sidewalk was a public fora, because it functioned as a public thoroughfare.

The Court then distinguished these cases from the prohibition of leafleting on the Plaza, and found it to be reasonable in light of the Plaza's particular and limited function and purpose.

The opinion then made the following observation.

> This is especially so where neighboring Damrosch and Dante Park and the public sidewalks surrounding Lincoln Center, provide ample alternative venues for groups such as the Union who wish to voice their views to Lincoln Center's patron's. See *Cornelius* 473 U.S. at 809 (finding a regulation reasonable where speakers have access to alternative channels through which they can reach their intended audience.) Accordingly, we conclude that Lincoln Center Inc's policy prohibiting leafleting, also passes constitutional muster. 31 F.3d at 556.

The parties have presented extensive arguments as to the significance of this decision in general, and the latter quotation in particular. Relevant to an assessment of these issues is a portion of the transcript of the oral argument before the circuit, consisting of an exchange between Judge Straub, (who incidentally authored the opinion), and Charles Sims, attorney for Lincoln Center in that case. The transcript reads as follows:

> MR. STRAUB: Wouldn't it be one thing to prohibit a rally as opposed to having a couple of leafleters walking about?
>
> MR. SIMS: The judgment has been made. I mean, they have a security force. There is also an impact on Lincoln Center's own proprietary interests. They rely on a board and on the generosity of donors. They have tried to, and I think succeeded quite admirably, in creating an atmosphere where people feel relaxed.
>
> MR. STRAUB: Who would rather not take a leaflet and tuck it away in their tuxedo.
>
> MR. SIMS: They can take a leaflet on the sidewalk - - under a recent ruling, they can take leaflets on their way, you know, down there. But the plaza itself, as the Court found, is a place apart, designed for the gathering of audience and, frankly, is a nice way to get your head together when you are going in.

The parties have stipulated in connection with this exchange, that Sims, when he made reference to a "recent ruling" in his response to Judge Straub, was referring to my decision. It was further stipulated that neither my decision nor a citation of my decision was provided to the Court.

Both Charging Party and General Counsel contend that the Second Circuit's decision related above, explicitly holds that leafleting on the Columbus Avenue sidewalk is protected, and cannot be prohibited by Respondent.

Respondent on the other hand argues that the decision has little or no precedential significance to the instant case, since the Court's decision was confined to regulating conduct on the Plaza. In that regard, Respondent points out that the decision made no specific findings

concerning the Columbus Avenue sidewalk, and did not discuss the possible effect of the license agreement on the issue, which issue was neither litigated nor briefed to the Court. Further, Respondent argues that the portion of Judge Straub's opinion which makes reference to "public sidewalks surrounding Lincoln Center", cannot mean the Columbus Avenue sidewalk, since this sidewalk is not a public sidewalk as per the license agreement. Finally, Respondent contends that even if it is found that the Court was including all sidewalks, in its opinion, that at most any conclusion inferred from the quoted statement constitute "dicta" which cannot be relied upon as precedent.

With respect to the issue of what the Court meant by "public sidewalks" in its opinion, I find that it is clear that the Court was referring to all of the sidewalks surrounding Lincoln Center, including the Columbus Avenue sidewalk.

While as Respondent argues, the decision did at one point refer to "public areas" managed by Lincoln Center to include the Columbus Avenue sidewalk, it also included Damrosch Park in that same footnote. Thus it cannot be reasonably contended as Respondent argues that the Court's reference to public sidewalks meant only the sidewalks other than Columbus Avenue. The Court included Damrosch Park, Dante Park and all the sidewalks as alternative venues for leafleting, and made no distinction between these areas. Further, the exchange during oral argument between Respondent's attorney Sims and Judge Straub serves to confirm this conclusion. Attorney Sims, in response to Judge Straub's obvious concern about alternative venues for leafleting stated that leaflets can be distributed on the sidewalk under a recent ruling. Since the parties have stipulated that the ruling referred to by Sims was my decision, which dealt with the Columbus Avenue sidewalk, it is clear that the Columbus Avenue sidewalk was included in the Court's description of alternative venues to leaflet.

However, this conclusion does not answer the more important question of what significance to be attached to this statement by the Court, as well as to the decision in general. I do not agree with Charging Party or General Counsel that the decision "resolves the issue" of whether leafleting is protected on the Columbus Avenue sidewalk, since as Respondent correctly observes, that issue was not expressly before the Court, and it was not called upon to and did not make any such finding. Further, the issue of the effect of the License Agreement on the right to restrict leafleting was not litigated, briefed, nor considered by the Court. Therefore, I agree with Respondent, that the statements of the Court, can at most be considered "dicta".

Nonetheless, I do not agree with Respondent that "dicta" cannot be relied upon at all. In my view, the decision itself, as well as the concluding paragraph, constitutes highly persuasive dicta, which can be considered supportive of my previous decision. I so find.

In my decision, I concluded that based on both New York law and Federal Constitutional law, peaceful leafleting cannot be prohibited by the City. Since whatever rights that Respondent has to regulate leafleting is derived from its license agreement with the City, I further concluded that Respondent as the licensee can have no greater rights than the City, to prohibit leafleting. I further found that the City, as the licensor, agreed that Respondent, notwithstanding the license agreement, cannot prohibit peaceful leafleting on the Columbus Avenue sidewalk.

In my view these findings are supported by the Court decision in general, as well as the last paragraph of the decision. The decision made several references to public sidewalks as public fora, citing many of the same cases cited in my decision. It is clear from the opinion, that it was quite concerned with the prohibition against leafleting, (as opposed to rallies and

demonstrations) on the plaza.[7] Therefore, the statement made in the opinion by Judge Straub, that the public sidewalks (which I have found includes the Columbus Avenue sidewalk) provide ample alternative venues for leafleting, can be construed as at least an indication that the Court would view a prohibition on leafleting on that sidewalk as constitutionally impermissible. I so conclude, and therefore find that the Second Circuit's decision provides further support for my decision, and my conclusions with respect to the rights of Respondent to prohibit leafleting on the Columbus Avenue sidewalk. That is, the Columbus Avenue sidewalk is considered a public forum under the precedent cited in my decision, as well as the 2nd circuit opinion, and Respondent cannot lawfully exclude the Union from peaceful leafleting there.

Charging Party, relying on the statements made by attorney Sims during the oral argument before the 2nd Circuit, argues that Respondent be estopped from asserting that it can prohibit leafleting on the Columbus Avenue sidewalk, because it has unfairly manipulated the Judicial process *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). The Supreme Court therein applied the doctrine of judicial estoppel and set forth criteria for its assertion. First, a party's later position must be clearly inconsistent with its earlier position. Second, the party must have succeeded in persuading a Court to accept that party's earlier position, so that Judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled. Third, the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment, on the opposing party if not estopped.

Charging Party argues that all of the above criteria have been met here for the application of the doctrine, and that Respondent should be precluded from asserting that it can prohibit leafleting on the Columbus Avenue sidewalk, because it played "fast and loose with the Courts". In that regard, Charging Party notes that Respondent both at the District Court and Circuit Court preceedings dealing with the Plaza, continually misled the Court by assuring the Judges that the Union had been and would continue to be allowed to leaflet on the sidewalk, while asserting as the Court ultimately concluded that the sidewalk was one of the appropriate alternative venues for leafleting by the Union, that made Respondent's decision to ban such conduct on the Plaza, a reasonable one.

Thus it is asserted and I agree that this position taken by Respondent in that case is clearly inconsistent with the position taken by it before me, that it had the right to ban such leafleting on the sidewalk. I also agree that the evidence discloses that Respondent misled the prior judges by its statements. I note particularly Sims' reference to a prior ruling (my decision) coupled with a statement that the Union can leaflet on the sidewalk. It is significant that Sims did not mention to the Court that this ruling was an ALJ decision, which has no precedential effect, and more importantly that Respondent disagreed with it, and as of that time, had filed the motion to reopen the hearing, in order to seek dismissal of the complaint.

However, it is not clear whether Respondent can be found to have derived an unfair advantage or imposed an unfair detriment on the opposing party, if not estopped. Charging Party argues that in this regard, that if Respondent had candidly told the Courts of its intention to ban leafleting on the sidewalk, its alternative venues argument would have been much weaker and the ban on leafleting on the Plaza would have been viewed as much less reasonable. However, these assertions are not clear from the Court decision. While the Court was certainly concerned about alternative venues, the sidewalk was but one of several mentioned by the Court, such as Damrosch Park, Dante Park, and sidewalks other than the

[7] See *Krishna v. Lee* supra also cited in my decision.

Columbus Avenue sidewalk. It is not at all certain, or even probable that the Court would have ruled differently, even if Respondent had disclosed its true position on banning leafleting on the Columbus Avenue sidewalk. Moreover, there is no evidence that Union relied upon or took any action based on Sims' misleading statement of Respondent's position.

Further, the Board does not apply the doctrine of Judicial estoppel in cases where it, has not been a party to the prior proceeding. *Fieldbridge Associates*; 306 NLRB 322, 323 (1992), enfd. 982 F.2d 845 (2nd Cir. 1993). Moreover, even apart from the requirement of identity of the parties, in order to give preclusive effect to a prior decision involving a particular issue, (1) the issues in both proceedings must be identical, (2) the issue in the prior proceeding must have been actually litigated and decided, and (3) the issue previously litigated must be necessary to support a valid and final judgment on the merits. *Local 32B v Fieldbridge*, supra 982 F.2d at 849; *In re PCH Associates*, 949 F.2 585, 593 (2nd Cir. 1991).

Here, the issues are clearly different in both cases, since the prior case involved conduct on the Plaza, while the instant matter concerned regulating conduct on the sidewalk. Additionally, the issue of the lawfulness of prohibiting leafleting on the sidewalk was neither litigated nor decided, and the issue of regulating conduct on the sidewalk was not necessary to support a valid and final judgment on the merits.[8]

Accordingly, for the above reasons, I do not deem it appropriate to apply the doctrine of collateral estoppel against Respondent and deny it the right to litigate the proprietary of its actions in prohibiting the Union from engaging in peaceful leafleting on the Columbus Avenue sidewalk.

However, I do believe that it is appropriate to consider the statements made by Sims to the Court, (which were similar to statements made before the District Court in affidavits and briefs), as admissions by Respondent, that it did not have the right to lawfully evict leafleters from the sidewalk. Thus when Sims made reference to my decision, in support of his statement that the Union leafleters could leaflet on the sidewalk, this constitutes an admission by Respondent that my decision was correct with respect to this issue. Sims did not inform the Court that Respondent believed that my conclusion that Respondent could not lawfully prohibit leafleting on the sidewalk was wrong, or that it intended to file exceptions to that conclusion. By failing to do so, Respondent has in my view implicitly agreed with that conclusion, and such conduct can be construed as an admission against Respondent. I so find.

CONCLUSION

In sum, I have concluded that Respondent has not established that Diaz committed perjury during his prior testimony and that no changes should be made in any of my prior factual findings.

Moreover, I also conclude, that even if Diaz's testimony is discredited, that the record fully supports all of my prior findings and conclusions of law.

[8] It is true as Charging Party argues that the Court's opinion does suggest, as I have noted, that it would have found that prohibiting leafleting on the Columbus sidewalk does not meet constitutional muster. However, it made no such explicit finding, and at most such a finding could be considered dicta.

Finally, I conclude that my decision is supported by the Court of Appeals decision in *Local 100 v. City of New York et al*, and that the statements made by attorney Sims in that case, constitutes additional admissions (similar to admissions made before the District Court) against Respondent.

I therefore reaffirm all of my prior conclusions and recommend[9] issuance of the Recommended Order set forth in that decision.

Dated, Washington, D.C.

Steven Fish
Administrative Law Judge

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.